No. 423.

Brf. of Hare for Appellee.

FILED
OCT 9 1900
JAMES H. McKENNEY

Filed Oct. 9, 1900.

In the

Supreme Court of the United States.

THOMAS C. ANDREWS,
Appellee,

vs.

THE UNITED STATES, and the KIOWA and COMANCHE INDIANS,
Appellants.

No. 42

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLEE.

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IN THE

Supreme Court of the United States.

THOMAS C. ANDREWS,
APPELLEE,
vs.
THE UNITED STATES, AND THE KIOWA AND COMANCHE INDIANS,
APPELLANTS.

No. 7836.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLEE.

In this cause the court below found the following facts.

"In June, 1877, while the claimant with a large number of cattle was traveling over the Chisum Trail, the same being an established trail, enroute from Texas to a market in Kansas, and while camped on the Washita River on the Kiowa and Comanche Reservation in the Indian Territory, Indians belonging to the Kiowa and Comanche Tribes of Indians, took and drove away property of the kind and character described in the petition, the property of claimant, which was then and there of the value of eight thousand three hundred dollars ($8,300.00)." Said property was taken as aforesaid without just cause or provocation on the part of the owner or the agent in charge and has never been returned or paid for.

Conclusion of Law.

Upon the foregoing Findings of Fact the court decides as a conclusion of law that the claimant, Thomas C. Andrews, recover judgment against the United States and the Kiowa and Comanche Indians, for the sum of $8,300.

Appellants ground the Appeal to this Court upon the following propositions.

> "The depredation having been committed on the Kiowa and Comanche Reservation the claimant was there contrary to the expressed provisions of the Treaty of 1868 with said Indians, and was therefore a trespasser and could not recover under the Act of March 3, 1891."

Appellants rest their appeal upon one proposition namely, that the owner of the property being a trespasser in the Indian Territory cannot recover under the Act of March 3, 1891.

Counsel for appellee beg to present several reasons showing why this proposition is unsound. The first of which is:

That there is not only no authority in the Act of March 3, 1891, for making this defense, but that it is specifically prohibited by the terms of said act.

The language of the law is:

> "Said Court of Claims shall have and possess "jurisdiction and authority to inquire into and "finally adjudicate *in the manner provided in this* "*Act* all claims of the following classes."

It seems to follow that the court being authorized to adjudicate these cases in the manner provided in the act, and the act clearly setting forth the grounds upon which the court should inquire into and adjudicate, then if the court should extend inquiry beyond that declared in the

statute, it would to that extent be adjudicating losses in a manner not provided in the law. It is enough to add here, that the owner of the property having the same in the Territory, or being a trespasser is not found among the defenses set out in the statute, and not being so declared in the law the court was prohibited from entertaining it.

II. The Owner of This Property Was Not a Trespasser Under the Treaty.

If being a trespasser could be made a defense, then under the Treaty referred to, and quoted by counsel for appellants, he was not a trespasser.

In Article II, Subdivision 6 of the Treaty of 1868, referred to by appellants, the Indians obligated themselves:

> "That they will not in future object to the construction of railroads, wagon roads, mail stations, or other works of utility, or necessity, which may be ordered, or permitted by the laws of the United States, but should such roads, or other works be constructed on the lands of the Reservation, the Government will pay the Tribe, &c."

In Subdivision 3 of same article the Indians pledged themselves as follows:

> "Will not attack any persons at home, nor traveling, nor molest, or disturb any wagon train, coaches, mules or cattle, belonging to the people of the United States, or to persons friendly therewith."

Then it was agreed that roads may be constructed across the reservation, that they will not molest any mules, or cattle, the property of citizens, anywhere in the United States. If the owner was driving his cattle over a legally established route, trail or road, as the court finds as a

fact, then was he a trespasser, or was the Indians authorized to confiscate his property and convert it to their own use, notwithstanding the obligations of their Treaty? The conclusion is that as such trails or roads might be legally constructed that the facts established under the finding of the court are that the route was so constructed and used for the traveling public.

III. The Owner Was Not a Trespasser Under the Law.

Section 463 Revised Statutes, enacted July, 1832, and still in force, provides as follows :

> "SEC. 463. The Commissioner of Indian Affairs "shall under the direction of the Secretary of the "Interior, and agreeably to such regulations as the "President may prescribe, have the management of "all Indian affairs and of all matters arising out "of Indian relations."

Mere assertion or opinion cannot efface or destroy the strength of the language here employed. The laying out of trails, or routes through the Indian Territory, for the passage of emigrants, their families and property, or the driving of stock to market across the same, of necessity created the most important of all relations between the citizen, the Indians, and the Government; and to manage these relations was by this statute made the duty of the Commissioner of Indian Affairs under the direction of the Secretary of the Interior. This law, however, did not authorize the adjustment of such losses, as the Indians might wrongfully perpetrate on the whites, or the white man upon the Indians. Congress retained this power until the Act of March 3, 1891. On May 29, 1872, however, an Act was passed, Sec. 466, Revised Statutes, extending the power of the Secretary of the Interior and the Commissioner of

Indian Affairs, which authorized those officials to inquire into and report to Congress certain losses sustained by citizens of the United States by the act of the Indians, which act is set out at length on page 10 of appellant's brief, and here referred to.

Counsel for appellants argue: That the Section last above referred to does not indicate that the Indian Treaties are subject to the arbitrary rulings of the Secretary of the Interior, &c., but only prescribes the manner for presenting claims.

There is no contention that this section "authorized the Secretary of the Interior to annul Treaties nor that he intended to set aside the Treaty of 1868." Our contention is that he acted in pursuance of the authority granted him in Section 466, in promulgating the rules published by him under the authority of said section. That all of his official acts under this law were subsequently expressly ratified by Congress and by such authority placed beyond dispute.

Counsel for appellants on page 9 of their brief say that the only duty of the Secretary under this section was to prescribe the manner of presenting claims.

The section itself would seem to be better authority, and I find that it not only authorized the Secretary to prescribe the rules for presenting claims, but also to set forth the degree and character of the evidence to support such claims. To investigate all claims that are presented, and to report to Congress at each session thereafter the nature, character, and amount of such claims, whether allowed by him or not, and *the evidence upon which his action was based*: and this section closes with a prohibition against any payment unless specially appropriated for. It will be observed that this law did not authorize the Secretary of the Interior or those acting under his

authority to do any act further than simply make inquiry investigate, and report to Congress, to take evidence and report that evidence, to give an opinion as to the amount of loss or damage. He could not disturb any citizen or Indian, in person or property, by reason of the authority here conferred. Congress reserved that authority and did not delegate it. Hence it is a mere gratuity for counsel to say that the language of the Act did not indicate that the Indian Treaties are subject to the arbitrary rulings of the Secretary of the Interior. Congress made the Secretary of the Interior the instrument or means of acquiring information and knowledge for its own future action, and it did act as will be shown.

Of course it will be admitted that Congress has the power to repeal, annul or revise existing laws or treaties, and that a law enacted, that is in conflict with a former law, or treaty will operate as annulling or repealing to the extent of such conflict.

If the Secretary of the Interior performed his duty, and it is conclusively presumed he did, then in the cases he investigated and reported, Congress had before it in such reports the opinion of the Secretary in each case of the amount and value of the property lost, and the evidence in support of such opinion.

When the Secretary of the Interior made his reports to Congress, in each case so reported his duties ended, and all future action growing out of these duties of the Secretary of the Interior, that operated directly upon the Indian, or a citizen, was the work of Congress and not the Secretary of the Interior. If the citizen was to be paid for his loss, Congress must provide the means and manner in which it is to be done, and whether the manner or means so provided by Congress was in conflict with former laws, or treaties, is not a subject of debate.

Action of Congress.

The reports of the Secretary of the Interior embodying his action in each case, with the evidence he had taken, whether approved, or disapproved, the amount recommended for payment, with the rules and regulations which he promulgated, all being before Congress, what action did the law making power take in the premises?

The Secretary of the Interior had in various reports investigated some four thousand cases. These losses according to the evidence had occurred in various States and Territories, and a large number of them in the Indian Territory, and on Indian Reservations. In recommending payment the Secretary of the Interior had made no distinction as to place or locality, and where losses had occurred on the Indian Reservations they were approved or disapproved according to the proof precisely the same as losses occurring elsewhere, and these facts were before Congress when that body undertook to adjust and settle these losses for the citizens.

It may not be irrelevant here to say that Congress after several sessions, and after the formation of a Committee on Indian Depredations found it impracticable to properly determine all these losses, and give the necessary attention to other business. The result was the passage of the Act of March 3, 1891, which transferred the determination of these claims to the Court of Claims. When this Act was passed Congress had before it the cases reported by the Secretary of the Interior to the forty-fifth Congress, Ex. Doc. 126 to the forty-ninth Congress, Ex. Doc. 77; to the fiftieth Congress, 1st Session, Ex. Doc. ——, ——, 2nd Session, fiftieth Congress, Ex. Doc. 103, and to the fifty-first Congress, 1st Session, Ex. Doc. 122, accompanied by the evidence taken in each case which was investigated, and to the laws that Congress then enacted

claimants must look for their remedy and the defendants must look for their defense as clearly provided by that act, which is, that the Court of Claims shall inquire into and adjudicate all these claims in the manner provided in the Act, that is,

> "ALL claims for property of the citizens of the "United States taken or destroyed by Indians "* * * in amity with the United States."

At the passage of this act the authority to investigate these claims was vested in the Secretary of the Interior and that there *should* be no conflict or misconception of the cases which the Court of Claims should adjudicate, a second clause was added, namely:

Such jurisdiction shall also extend to all cases which have been examined and allowed by the Interior Department, and also to such cases as were authorized to be examined.

There is no mistaking the power and authority here imposed upon the court, nor the manner of exercising the same, nor the cases that were to be adjudicated. The court was commanded to first adjudicate these cases in the manner provided in the law, and they were to adjudicate and determine all cases where property was taken or destroyed by Indians at any locality in the United States of America. All cases in which no proof had been made and which came within the period of limitation were to be established by proof of facts as named in that law; all defenses that could be made to a recovery when the claimants made out a prima facie case was named in that law, and if a case had been filed in the Interior Department, and had not been proved then the additional proof could be made in the court. If a case had been proved and a sum recommended, then the

claimant was entitled to a judgment without further proof, unless as provided in section 4 of said act the claimant or the United States should elect to reopen the case, and try the same before the court, provided, *that the party electing to reopen the case shall assume the burden of proof.*

Here this last clause is "assume the burden of proof," not the authority of law, but the proof of facts which established the claim, or which defeat the claim as before provided in the act. The intent of Congress as here expressed seems so clear that it is not perceived how it can be mistaken. For, if the law placed all these claims upon an equality and helped the citizens to the extent, of not requiring him to again make proof before the court that he had already made before the Secretary of the Interior, this did not change the right to recover; all claims, whether presented to the Secretary of the Interior or not, were on exact equality. Now, if Congress when it enacted this law, had before it hundreds of cases where the losses occurred in the Indian Territory and on Indian Reservations and which had been recommended for payment by the Secretary of the Interior, and failed to make the facts of loss occurring in the Indian Territory, a defence, how could the Court of Claims allow the case to be opened to determine a question of law? How could the Court of Claims allow a defence not mentioned in the law, and especially over that clause which is surely mandatory, namely, *to inquire into and finally adjudicate in the manner provided in this act*, so that it is not perceived how counsel can invoke a defence not only unknown to the law, but clearly prohibited by the law.

While I do not deem it necessary, yet it may not be amiss to refer the court to the letter of the Secretary of the Interior of date April 17, 1878, and which refers to and copies a former letter dated in 1874, published in Sen-

ate Documents, Nos. 86 to 100, 2d Session, Forty-fifth Congress, 1877-1878, and which contains Ex. Doc. No. 74, and in which the Secretary of the Interior says, in his report to the Senate:

> "As a general proposition, it is quite clear that no community, politically or otherwise organized, whether State, Territorial, or Indian Tribes, can legally delay or obstruct by tax or otherwise the free transit, whether of persons or merchandise, to and from market over any part of the territory of the United States." (See Report, Sept. 16, 1874.)

The court is also referred to the official map of the Commissioner of Indian Affairs showing the different trails and roads laid out through the Indian Territory, and showing that the trail on which these cattle were taken was one of them, and the authority to pass over these routes of all persons, with their property, &c.

Conclusion.

The foregoing presentation shows that the Court of Claims was limited in its inquiry to the terms of the Act of 1891. That by the Statutes referred to, certain authority was conferred upon the Secretary of the Interior, in which that official was authorized to measure the relations which should exist between the Government, the Indian, and the citizen. That that authority was extended to an inquiry of damage or loss. That the Secretary of the Interior did find for losses. That Congress in the Act of 1891, approved his acts. That these losses occurring in the Indian Territory were referred to the Court of Claims, and that court in obedience to the law, has rendered a great number of judgments, where the loss occurred in the Territory, and especially on the Kiowa and Comanche Reservation and the Osage Indian Reservation, and Con-

gress has appropriated for their payment and they have been paid. Now did not Congress in making that appropriation by a solemn enactment affirm the judgment of the court, and if the case now before the court has equal merits as those determined, how could the court make a distinction that the law-making power thus said shall not be made, therefore, when the Court of Claims found that this claimant was on an established trail, in the Indian Territory, enroute to market from Texas to Kansas, was not that court authorized, and in fact was it not required, as a conclusion of law, (the facts all being established,) to render the judgment which was rendered. It is therefore respectfully submitted that the judgment rendered in favor of the claimant should be affirmed.

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Attorney for the Claimant.